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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON

10 KELLEY WILSON,

Civil No. 06-1261-AA  
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,  
Commissioner of Social Security,

14 Defendant.

15 \_\_\_\_\_  
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17 Linerud Law Firm  
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20 Attorney for plaintiff

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Attorneys for defendant

AIKEN, Judge:

Claimant, Kelley Wilson, brings this action pursuant to the  
Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the  
2 Commissioner denying her application for disability insurance  
3 benefits under Title II of the Act. 42 U.S.C. §§ 401-33. For  
4 the reasons set forth below, the Commissioner's decision is  
5 affirmed.

#### 6 **PROCEDURAL BACKGROUND**

7 Plaintiff protectively filed her application for disability  
8 insurance benefits on July 22, 2002. Tr. 100. This application  
9 was denied initially and upon reconsideration. On May 27, 2005,  
10 after three separate hearings<sup>1</sup>, the Administrative Law Judge (ALJ)  
11 ruled that plaintiff was not disabled. Tr. 18-29. The Appeals  
12 Council denied plaintiff's request for review, tr. 6-11, making  
13 the ALJ's decision the final agency decision. See 20 C.F.R. §§  
14 416.1481, 422.210.

#### 15 **STATEMENT OF THE FACTS**

16 Plaintiff was 36 years old on the date of the ALJ's  
17 decision. She alleges disability beginning December 2001 based  
18 on a combination of impairments, including: left carpal tunnel  
19 syndrome; fibromyalgia with chronic pain throughout her body but  
20 particularly in the low back and shoulder areas; pain in the  
21 chest, elbows, hands, neck, hips, knees, and feet; due to pain  
22 she is unable to get out of bed approximately four to six times  
23 per month; unable to sit for more than 10-15 minutes at a time;  
24 difficulty reaching forward or overhead; significant swelling of  
25 the right knee with water retention which requires leg elevation  
26 lasting two weeks to two months at a time; headaches that are

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28 <sup>1</sup> The ALJ held a hearing on July 21, 2004, tr. 543-91; March 9,  
2005, tr. 592-623; and April 13, 2005, tr. 624-42.

1 sensitive to light and noise which cause nausea, vomiting, and  
2 blurred vision; left shoulder impingement syndrome; depression  
3 with crying spells and suicidal thoughts; memory and  
4 concentration deficiencies; irritability; fatigue; diabetes;  
5 trouble holding things; and status post carpal tunnel release  
6 left hand. Tr. 549-574.

### 7 STANDARD OF REVIEW

8 This court must affirm the Secretary's decision if it is  
9 based on proper legal standards and the findings are supported by  
10 substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
11 498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
12 mere scintilla. It means such relevant evidence as a reasonable  
13 mind might accept as adequate to support a conclusion."  
14 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
15 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
16 The court must weigh "both the evidence that supports and  
17 detracts from the Secretary's conclusions." Martinez v. Heckler,  
18 807 F.2d 771, 772 (9th Cir. 1986).

19 The initial burden of proof rests upon the claimant to  
20 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
21 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
22 an "inability to engage in any substantial gainful activity by  
23 reason of any medically determinable physical or mental  
24 impairment which can be expected . . . to last for a continuous  
25 period of not less than 12 months. . . ." 42 U.S.C.  
26 § 423(d)(1)(A).

27 The Secretary has established a five-step sequential  
28 process for determining whether a person is disabled. Bowen v.

1 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
2 416.920. First the Secretary determines whether a claimant is  
3 engaged in "substantial gainful activity." If so, the claimant  
4 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
5 §§ 404.1520(b), 416.920(b).

6 In step two the Secretary determines whether the claimant  
7 has a "medically severe impairment or combination of  
8 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
9 §§ 404.1520(c), 416.920(c). If not, the claimant is not  
10 disabled.

11 In step three the Secretary determines whether the  
12 impairment meets or equals "one of a number of listed impairments  
13 that the Secretary acknowledges are so severe as to preclude  
14 substantial gainful activity." Id.; see 20 C.F.R.  
15 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
16 presumed disabled; if not, the Secretary proceeds to step four.  
17 Yuckert, 482 U.S. at 141.

18 In step four the Secretary determines whether the claimant  
19 can still perform "past relevant work." 20 C.F.R.  
20 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
21 disabled. If she cannot perform past relevant work, the burden  
22 shifts to the Secretary. In step five, the Secretary must  
23 establish that the claimant can perform other work. Yuckert, 482  
24 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
25 (f). If the Secretary meets this burden and proves that the  
26 claimant is able to perform other work which exists in the  
27 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,  
28 416.966.



1 significant numbers in the economy: information clerk, cashier,  
2 booth cashier, and small products assembly. Tr. 28, 29, Finding  
3 5. Accordingly, the ALJ found plaintiff not disabled.

#### 4 Plaintiff's Credibility

5 The ALJ concluded that plaintiff was not credible. That  
6 finding was relevant to the ALJ's RFC finding, and ultimately his  
7 finding of not disabled. The plaintiff disagrees with the ALJ's  
8 assessment of her credibility.

9 An ALJ must engage in a two-step analysis when considering  
10 a claimant's subjective symptom testimony. Smolen v. Charter, 80  
11 F.3d 1273, 1281-82 (9<sup>th</sup> Cir. 1996). First, a claimant must  
12 produce objective medical evidence of an underlying impairment  
13 that could reasonably be expected to produce some degree of  
14 symptom. Id. at 1281-82. Second, if the claimant produces such  
15 evidence, and if the record lacks evidence of malingering, an ALJ  
16 may find a claimant not entirely credible by giving specific,  
17 clear and convincing reasons, supported by substantial evidence,  
18 indicating the ALJ has not arbitrarily discredited a claimant's  
19 testimony. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir.  
20 2002). Further, not all of an ALJ's reasons for discrediting a  
21 claimant must be upheld, as long as substantial evidence supports  
22 the ALJ's determination. Batson v. Barnhart, 359 F.3d 1190, 1197  
23 (9<sup>th</sup> Cir. 2004).

24 Plaintiff produced evidence of an underlying impairment  
25 that could reasonably be expected to cause some degree of  
26 symptom. Therefore, the ALJ could find plaintiff not credible  
27 only by providing specific, clear and convincing reasons,  
28 supported by substantial evidence in the record. The ALJ has met

1 that burden. The ALJ's credibility assessment included evidence  
2 that medical reports repeatedly documented normal examinations;  
3 diagnostic studies were essentially normal with only mild  
4 abnormalities indicating mild carpal tunnel syndrome and mild  
5 disc bulging; there was no medical evidence of muscle atrophy  
6 which the ALJ found inconsistent with plaintiff's alleged need to  
7 lie down due to pain 3 or 4 days a week for the majority of the  
8 day with walking and standing only to use the bathroom. Further,  
9 the ALJ noted that it was unreasonable to conclude that an  
10 individual alleging she was so incapacitated by pain that she was  
11 absolutely unable to function three or four days a week, and then  
12 able to function without any limitations on the other three or  
13 four days a week. Tr. 26-27. Finally, the ALJ relied on the  
14 report of a fraud investigator submitted via videotape as  
15 evidence of plaintiff's behavior and ability to ambulate over one  
16 mile, ascend and descend 22 stairs without using the handrail,  
17 and carry sacks, all without noticeable pain, abnormality or  
18 limitation.

19 When a claimant's statements about the intensity,  
20 persistence, or functionally limiting effects of symptoms are not  
21 substantiated by objective medical evidence, the ALJ "must  
22 consider all of the evidence in the case record, including any  
23 statements by the individual and other persons concerning the  
24 individual's symptoms . . . and must then make a finding on the  
25 credibility of the individual's statements about symptoms and  
26 their functional effects." SSR 99-2p, 1999 WL 271569.

27 The ALJ is charged with determining credibility of medical  
28 testimony and resolving ambiguities in the evidence. Morgan v.

1 Comm'r of Soc. Sec. Admin., 169 F.3d 595 (9<sup>th</sup> Cir. 1991). "Where,  
2 as here, the ALJ has made specific findings justifying a decision  
3 to disbelieve an allegation . . . and those findings are  
4 supported by substantial evidence in the record, our role is not  
5 to second-guess that decision." Id. at 599. Here, the ALJ's  
6 credibility finding is supported by substantial evidence in the  
7 record, therefore, "this court may not engage in second-  
8 guessing." Thomas 278 F.3d at 959.

9 **CONCLUSION**

10 The Commissioner's decision is based on substantial  
11 evidence, and is therefore, affirmed. This case is dismissed.  
12 IT IS SO ORDERED.

13 Dated this 29 day of October 2007.

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17 /s/ Ann Aiken

18 Ann Aiken  
19 United States District Judge  
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